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79-1336

No.

In the

Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Petitioner prays that a Writ of Certiorari issue to review the order of the Supreme Court of Iowa rendered in these proceedings on November 30, 1979, affirming the opinion of the Iowa Court of Appeals filed October 18, 1979.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the District Court of the State of Iowa in and for Webster County, filed July 29, 1977, are unreported and appear at Appendix pages 12a-33a.

The opinion of the Iowa Court of Appeals, filed October 18, 1979, is unreported and appears at Appendix pages 2a-12a.

The Order of the Supreme Court of Iowa, filed November 30, 1979, is unreported and appears at Appendix page 1a.

JURISDICTION

The Order of the Supreme Court was rendered on November 30, 1979, and is final. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 USC §1257(3).

STATEMENT OF THE CASE

In April of 1973, the Chicago and Northwestern Transportation Company ("Transportation Company") ceased operating trains over its branch line to Kalo Brick & Tile Company's ("Kalo") plant site. On November 14, 1973, the Transportation Company applied to the Interstate Commerce Commission, pursuant to the provisions of the Interstate Commerce Act, 49 USC §1(18), for a certificate of public convenience and necessity authorizing it to abandon its line to Kalo. On September 13, 1974, Kalo filed a petition in the Iowa District Court for Webster County seeking $350,000 in damages from the Transportation Company for alleged destruction of Kalo's business. The petition, as amended, claims damages based on three state law theories: (1) violation of §479.3, Iowa Code, 1973, requiring rail carriers to furnish suitable cars to shippers; (2) violation of §479.122, Iowa Code, 1973, rendering rail carriers liable for damages caused by their negligence; and (3) common law tortious interference with contractual relationships between Kalo and its customers.[1]

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[1] The Transportation Company answered that Kalo's sole remedies were under 49 USC §1, et. seq., and that the state court did not have subject matter jurisdiction. (Appendix page 64a.)

On April 30, 1976, the Commission entered an order permitting abandonment that was affirmed by the Commission's order entered September 23, 1976.

Trial of Kalo's claims commenced October 19, 1976, and ended October 26, 1976.[2] The trial court's Findings of Fact, Conclusions of Law, and Judgment, filed July 29, 1977, dismissed all of Kalo's claims on the grounds that the trial court did not have subject matter jurisdiction, and that in any event the ICC had in prior proceedings decided issues adversely to Kalo that were determinative of all of Kalo's claims and Kalo was collaterally estopped from relitigating those issues. (Appendix pages 12a-33a.)

The Court of Appeals of Iowa reversed the trial court and remanded for a new trial, holding that the trial court had jurisdiction but not clearly addressing the res judicata/collateral estoppel issue.[3] (Appendix page 12a.)

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[2] On November 2, 1976, the Transportation Company filed a Motion to Dismiss, stating that pursuant to stipulation of record the Motion would be treated as though it was first made at the close of Plaintiff's evidence and renewed at the close of all the evidence, and raising the defenses of collateral estoppel based on the prior Commission proceedings, lack of subject matter jurisdiction because of the preemption of state law by the Interstate Commerce Act, and lack of subject matter jurisdiction because the issues fell within the primary jurisdiction of the ICC. (Appendix pages 68a-76a.)

[3] In Divisions I, II, and III of its Brief to the Court of Appeals the Transportation Company argued that Kalo was collaterally estopped because of the prior Commission proceedings and that the state court lacked subject matter jurisdiction because of the preemption of state law and because the Commission had primary jurisdiction.

The Transportation Company filed with the Iowa Supreme Court an Application for Further Review of the Decision of the Court of Appeals.[4] The Iowa Supreme Court affirmed the decision of the Court of Appeals.

The facts of the case are as follows:

Prior to April, 1973, the Transportation Company operated trains over a five mile long branch line running from Fort Dodge, Iowa, to Kalo. Kalo was the only shipper on the line in 1973, and used the line exclusively for Interstate Commerce. (Trial Court Opinion page 2, Appendix page 13a; Testimony of Jerry Schnurr, Appendix page 33a.) In 1967 earth slides occurred and portions of the Transportation Company's branch line disappeared into the Des Moines River. In order to continue providing trains to Kalo the Transportation Company leased a portion of the Fort Dodge, Des Moines & Southern Railway line. (Trial Court Opinion Pages 2-4, Appendix pages 14a, 15a.)

During the first few days of April, 1973, earth slides occurred along many points of the line leading to Kalo. On April 4, 1973, the Transportation Company notified Kalo that it could no longer send trains to Kalo's plant site. The Transportation Company then provided cars to Kalo at its Fort Dodge, Iowa, station about five miles from Kalo's plant. (Trial Court Opinion 4-5, Appendix page 15a.)

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[4] In §2(a), 2(b), and 3 of its Application for Further Review the Transportation Company raised the defenses of lack of subject matter jurisdiction because of the preemption of state law and because the Commission had primary jurisdiction, and also argued that Kalo was collaterally estopped by the prior Commission proceedings.

On April 18, 1973, Kalo notified its customers that it was going out of business but would fulfill its existing contracts. (Trial Court Opinion page 5, Appendix page 15a.)

Between April 4, 1973, and April 25, 1973, a decision was made by the Transportation Company that it could not maintain safe rail passage over the tracks leading to Kalo and that line was taken out of service by the Transportation Company's road master. The Transportation Company concluded that it could not stabilize the alignment of the tracks but it made no decision at that time as to whether it would attempt to abandon service to Kalo. (Trial Court Opinion page 5, Appendix pages 15a-17a.)

In August, 1973, Kalo stopped production, sold its inventory, and disposed of its assets. (Trial Court Opinion page 5, Appendix page 17a.)

On November 14, 1973, the Transportation Company applied to the Commission for permission to abandon its line to Kalo. Kalo filed objections to the abandonment and otherwise participated in the abandonment proceedings. After some delay,[5] on April 30, 1976, the I.C.C. entered an order making the following findings of fact:

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[5] The delay resulted because this was the period in which the Commission was wrestling with the problem of how to proceed with abandonment applications in light of the decision in *Harlem Valley Transportation Association* v. *Stafford,* 500 F2d 328, 335-336 (2nd Cir. 1974), holding that an environmental impact statement must be drafted and other requirements of the National Environmental Policy Act, 42 USC §4321-4347, must be met before the Commission could permit abandonment of a railroad line.

> "that the cost of rehabilitation of the applicant's line is estimated to be in excess of $150,000; that the cost of rehabilitation of the leased track is estimated to be in excess of $100,000; that, due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line . . . That THE CESSATION OF SERVICE OCCURRED BECAUSE OF CONDITIONS OVER WHICH APPLICANT HAD NO CONTROL, NOT BECAUSE OF WILLFUL ABONDONMENT . . . and that, under these circumstances, continued operation of the line would be an unnecessary burden on Applicant and on Interstate Commerce . . ." (Emphasis supplied)

The order provided for issuance of an appropriate certificate of abandonment. Upon Kalo's petition for reconsideration the April 30, 1976, order was affirmed by the I.C.C. in its order entered September 23, 1976. (I.C.C. Orders, Appendix pages 33a-41a.) No appeal was filed.

QUESTIONS PRESENTED

The Transportation Company operated over a five mile long branch line that became physically impassable on April 4, 1973. Kalo was the only shipper on the line. Kalo has sued the Transportation Company in State Court for $350,000 in damages for destruction of its business. All of Kalo's rail shipments over the line were in Interstate Commerce. The Interstate Commerce ("I.C.C.") had entered an order permitting the Transportation Company to abandon the line and finding that cessation of service was not an unlawful abandonment but was due to conditions beyond the Transportation Company's control, and that requiring reconstruction of the

line would be an undue burden of the Transportation Company and on interstate commerce.

This case presents the following questions for review:

1. Has the Interstate Commerce Act preempted the power of state courts over rail carriers in matters of railroad line abandonment and provision of car service in interstate commerce?

2. Do the Supremacy Clause of the Constitution and the doctrine of res judicata/collateral estoppel require a state court to give effect to prior decisions of the I.C.C., acting within its exclusive jurisdiction, involving the same parties and the same issues?

3. Does the I.C.C., rather than a state court, have primary and exclusive jurisdiction in matters requiring a determination of whether it would be reasonable to require a rail carrier to expend capital to reconstruct a rail line for the use of a shipper in interstate commerce?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The state statutes involved are §479.3, Code of Iowa, 1973, and §479.122, Code of Iowa, 1973. The federal statutes involved are the Interstate Commerce Act, 49 U.S.C. §1, et seq., and more particularly 49 U.S.C. §1(4), (10), (11), (13), (14), (17), (18), and (20); §8; and §9. Article VI, Clause 2 ("Supremacy Clause"), of the Constitution of the United States is also involved.

REASONS FOR GRANTING THE WRIT

I.

The Iowa Supreme Court Decision Erred In That It Failed To Recognize That The Interstate Commerce Act Has Preempted The Power Of State Courts Over Rail Carriers In Interstate Commerce In Matters Of Railroad Line Abandonment And Provision Of Car Service Over Those Lines.

The Iowa Supreme Court erroneously held that the State District Court for Webster County has subject matter jurisdiction to decide whether a rail carrier may be subject to damages for conduct found by a federal agency not to be unlawful.

Kalo has sued the Transportation Company under three theories: (1) alleged violation of §479.3, Code of Iowa, 1973, requiring railways to "furnish suitable cars to any and all persons who may apply therefore . . ."; (2) alleged violation of §479.122, Code of Iowa, 1973, rendering any railway liable for "damages sustained by any person . . ." because of the negligence of the railway; and (3) alleged tortious interference by the Transportation Company with the contractual relationships Kalo claimed it had with some of its customers. Kalo has never claimed the Transportation Company violated any federal statute.

The Interstate Commerce Act, 49 USC §1, et. seq.[1], has preempted state statutes and state common law in the

[1] Title 49, USC, was revised by Public Law 95-473. October 17, 1978. 49 USC §10101. et seq. The section headings of the new revised Act are correlated with the section headings of the pre-revision Act in the table of citations, *supra*. In the body of the argument, citations will be to the pre-revision Act.

fields of railroad line abandonment and provision of car service in interstate commerce. *Powell* v. *United States,* 300 U.S. 276, 287, 81 L.Ed. 643, 652, 57 S.Ct. 470 (1937) (adandonment); *Missouri Pacific RR. Co.* v. *Stroud,* 267 U.S. 404, 407-408, 69 L.Ed. 683, 685, 45 S.Ct. 243 (1925) (car service).

The undisputed, and only, evidence on the character of the commerce involved came from the testimony of a corporate officer of Kalo (Jerry Schnurr) who said Kalo's intrastate shipments were made by truck, and that the only use of rail transportation was for shipments in interstate commerce. (Transcript page 321, line 17, to page 322, line 2, Appendix page 33a.) The trial court affirmed this fact. (Trial Ct. Opinion page 2, Appendix page 13a.)

This is not a case involving failure to provide car service, for car service issues presume the physical ability to move cars over a line. (Trial Court Opinion page 12, Appendix page 21a.) That is, car service issues presume the existence of a physically operable line of railroad. No such line existed in this situation and the Commission found that the absence of a physically operable line did not result from any unlawful act of the Transportation Company. The Commission further found, in an unappealed order, that the cessation of service was not unlawful. In this case the Transportation Company lawfully imposed an embargo and took its line out of service because of physical conditions, and gave required notice to Kalo, the only shipper on the line. (Trial Court Opinion pages 3-6, Appendix page 15a.) The practice of instituting embargoes when lines become physically inoperable is well recognized. *Chicago & North Western Ry. Co.* v. *Union Packing Co.,* 373 F. Supp. 734, 736-737 (D. Nb. 1974); *Myers* v. *Arkansas & Ozarks Railway Corp.,*

185 F. Supp. 36, 41-42 (W.D. Ark. 1960); *Asbury* v. *Chesapeake & Ohio Railwap Company,* 314 F. Supp. 310, 312-313 (D.C. 1970).[2]

"'Car service' connotes the use to which vehicles of transportation are put; not the transportation service rendered by means of them." *Peoria & P. U. R. Co.* v. *United States,* 263 US 528, 533, 68 LEd 427, 430, 44 S.Ct. 194 (1923); *I.C.C.* v. *Oregon Pacific Industries, Inc.,* 420 US 184, 189, 43 L.Ed.2d 121, 125, 95 S.Ct. 909, 913 (1975). Car service statutes do not apply where freight service over a branch line is discontinued and abandoned. *Burlington Northern* v. *Department of Public Service,* 240 NW2d 554, 558-559 (Mn. 1976).

The line was lawfully abandoned pursuant to an order of the Interstate Commerce Commission entered *before* trial and judgment in this action. (Trial Court Opinion pages 19-22, Appendix pages 27a-30a; Def. Exhibit YYY, Apendix pages 33a-40a.) An "abandonment" of a rail line is governed exclusively by the provisions of the Interstate Commerce Act, 49 USCA §§1(18) and 1(20), and a suit for injunction in federal district court under 49 USCA §1(20) affords the only remedy for unlawful abandonment of a line. *Powell* v. *United States,* 300 U.S. 276, 287, 81 L.Ed. 643, 652, 57 S.Ct. 470 (1937)[3]

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[2] Also *see, General Foods Corporation* v. *Baker,* 451 F.Supp. 873, 876-877 (D. Md. 1978); *Holt Motor Company* v. *Nicholson Universal S.S. Co.,* 56 F.Supp. 585, 590-592 (D. Mi. 1944); and *see, Eastern Railway Co.* v. *Littlefield,* 237 US 140, 144-145, 35 S.Ct. 489, 59 LEd 878, 883 (1915).

[3] Also *see Texas & P. R.I.* v. *Gulf C. & S. F. Ry.,* 270 US 266, 272-273 (1926); *S.H. & W. Lumber Co.* v. *California & O.C. R.R.,* 154 F. Supp. 152, 154 (D. Or. 1957); *Asbury* v. *Chesapeake & O. Ry.,* 315 F. Supp. 310, 312 (D.D.C. 1970).

Even if this case involved an unlawful abandonment, which the Commission specifically found not to be the case, Kalo would have to bring its action in federal district court or before the ICC. 49 USC §9. There are no Iowa statutes providing any remedy for abandonment of rail lines. (Trial Court Opinion page 14; Appendix page 23a.) Kalo never sought an injunction or damages in Federal District Court.

To reach issues of car service, it must be assumed that a physical line exists, and the Commission determined that a physical line ceased to exist because of conditions beyond the Transportation Company's control. Even if it is assumed *arguendo* that this is a car service case, 49 U.S.C. §§1, 8, and 9 cover the whole field of railroad car service in interstate commerce and enactment of that federal legislation rendered invalid state statutes and the common law to the extent that they purport to regulate railroad car service in interstate commerce. *Hampton* v. *St. Louis, Iron Mountain and Southern Ry. Co.*, 227 US 456, 465, 57 LEd 596, 598, 33 S. Ct. 263 (1912); *Chicago, Rock Island & Pac. Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 US 426, 433, 436, 33 S. Ct. 174, 57 LEd 284 (1912); *Missouri Pacific RR. Co.* v. *Stroud*, 267 US 404, 407-408, 69 LEd 683, 685, 45 S.Ct. 243 (1925); *United States* v. *New River Company*, 265 US 533, 541-542, 68 LEd 1165, 172, 44 S.Ct. 610 (1923).

Indeed, even if a party was claiming damages under 49 USC §1 (11), the car service statute, it could pursue its damage claim *only* before the Interstate Commerce Commission or in a Federal District Court.[4] 49 USCA §9;

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[4] This requirement of 49 USCA §9 was not discussed in *Chicago, Rock Island & Pac. Ry. Co.* v. *Linwood Stone Products Co.*, 138 NW2d 902 (Ia. 1965), or in *Baird Brothers* v. *Minneapolis & St. Louis Railroad Co.*, 181

Interstate Commerce Comm. v. *Atlantic Coast Line Co.*, 383 US 576, 579, 16 LEd2d 109, 86 S.Ct. 1000 (1966).[5]

The Iowa Supreme Court erroneously ruled in general terms that Iowa may regulate service in interstate commerce so long as the regulation is not inconsistent with and does not interfere with the provisions of the Interstate Commerce Act. (Court of Appeals Opinion, page 5, Appendix page 8a.) In the context of this case the result of this erroneous ruling is to give a state district court the power to award damages for failure to provide car service where there are unappealed findings by the Commission that the cessation of service was not unlawful.

In support of its contention, the Court relied upon a series of cases decided prior to the Esch Car Service Act and the Transportation Act of 1920, which gave the Commission exclusive jurisdiction over provision of car service and railroad line abandonment. *Missouri Pacific R.R. Co.* v. *Stroud*, 267 US 404, 407-408, 69 LEd 683, 685, 45 S.Ct. 243 (1925); *Powell* v. *United States*, 300 US 276, 287, 81 LEd 643, 652, 57 S.Ct. 470 (1937).[6] 49 USC

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[4] (Continued)
Iowa 1104, 1123, 165 NW 412 (1917), which were relied on by the Iowa Court of Appeals.

[5] Also *see*, *Burlington Northern, Inc.* v. *Department of Public Service*, 240 NW2d 554, 559 (Mi. 1976); *Auracher* v. *Omaha & St. L. R. Co.*, 102 F. 1, 2 (Cir. Ct. S. D. Ia. 1900).

[6] The Iowa Court of Appeals mistakenly relied upon *Pennsylvania R.R. Co.* v. *Puritan Coal Mining Co.*, 237 US 121, 3 S.Ct. 484, 59 LEd 867 (1915), *Illinois Central R.R. Co.* v. *Mulberry Hill Coal Co.*, 238 US 275, 59 LEd 1306, 35 S.Ct. 760 (1915), and *Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.*, 242 US 120, 61 LEd 188, 37 S.Ct. 46 (1916).

§1(11) is the federal statute requiring carriers to provide "adequate car service" to shippers. That paragraph was added to the ICC Act in 1917 (Esch Car Service Act) and was amended to read as it now stands by the Transportation Act of 1920. 49 U.S.C.A. §1(11), Historical Notes, p. 117. The cases relied upon by the Iowa Court of Appeals in the opinion affirmed by the Supreme Court of Iowa therefore do not address or take account of the federal car service statute, 49 USC §1(11), and cannot be relied upon on the issue of whether state power has been preempted by the ICC Act in the area of provision of car service in interstate commerce.

Cases decided after the Transportation Act of 1920 hold that federal statutes have preempted the field of provision of car service in interstate commerce and that state law is invalid in that area. *Missouri Pacific RR. Co.* v. *Stroud,* 267 US 404, 407-408, 69 LEd 683, 685, 45 Sup. Ct. 243 (1925); *United States* v. *New River Company,* 265 US 533, 541-542, 68 LEd 1165, 1172, 44 Sup. Ct. 610 (1923).

In *Missouri Pacific Railroad Company* v. *Stoud, Supra,* at 267 US 407-408, 69 LEd 685, the Supreme Court of the United States said:

> "Congress in the exertion of its power over commerce among the states, has enacted laws for the regulation of the furnishing of cars to shippers. Interstate Commerce Act §1, (3), (4), (6), (10), (11), (12), (14); §3 (1); §15 (1). See United States v. New River Co. 265 U.S. 533, 451, 68 L.Ed. 1165, 1172, 44 Sup. Ct. Reg. 610 . . . The state law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce. (Citations omitted)

49 U.S.C. §1(17) (a) provides:

> *"Provided, however,* that nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this chapter and except as otherwise provided in this chapter."

Nothing in §17(a) authorizes what is happening here. §17(a) does not say and should not be construed to mean that a state may exercise the power to determine whether a carrier is providing reasonable interstate service. Such a construction deprives the limiting word "intrastate" of any meaning.

The exclusive domain of Federal statutes in the area of regulation of railroad car service in interstate commerce has been recognized by the high courts of states other than Iowa.[7] The interstate commerce operations of rail carriers should be treated uniformly in all states, including Iowa.

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[7] *In Re Rules and Regulations Nos. 31 and 32,* 225 NW2d 401, 408 (Nb. 1975); *Burlington Northern, Inc.* v. *Department of Public Service,* 240 NW2d 554, 556-559 (Mn. 1976); *Chicago, M., St. P. & P. R. Co.* v. *Michigan Pub. Serv. Commission,* 50 NW2d 884, 887 (Mi. 1952); *Davis* v. *Keystone Steel & Wire Co.,* 148 NE 47, 50-51 (Ill. 1925); *Louisville & N.R. Co.* v. *Brashear,* 289 S.W. 1094, 1098-1099 (Ky. 1927). It has been held that 49 USCA §§ 1(10) and 1(11), as administered by the I.C.C., govern whether the frequency of service may be reduced on a branch line carrying 82.1% interstate traffic. *Burlington Northern, Inc.* v. *Department of Public Service, supra,* at 240 NW2d 557-558. The Supreme Court of Michigan has ruled that a state regulatory agency has no power to require a rail carrier to operate an unprofitable line

The Iowa Supreme Court decision in the present case allows an Iowa State District Court to penalize a rail carrier by awarding damages for failure to expend substantial capital funds to reconstruct a railroad line running to Kalo's plant site for the purpose of improving Kalo's interstate rail service. This ruling, if not overturned, allows state courts to regulate interstate rail service by penalty. In the present case this ruling also allows a state court to overrule a prior decision of the Interstate Commerce Commission on issues concerning interstate commerce (Section II *infra*).

II.

The Iowa Supreme Court Decision Erred In That It Refused To Recognize That In The Kalo Line Abandonment Proceedings The I.C.C. Decided Issues Adversely To Kalo That Are Determinative Of Kalo's Claims In This Lawsuit, And Consequently The Supremacy Clause Of The Constitution And The Doctrine Of Res Judicata Prevent Kalo From Relitigating Those Issues.

It is well established in Iowa as well as other jurisdictions that where particular issues have already been litigated in one proceeding between the parties, the doctrine of collateral estoppel (issue preclusion) may be used defensively to bar a party to the first proceeding from relitigating those issues in a subsequent proceeding. *Goolsby* v. *Derby,* 189 NW2d 909, 914 (Iowa 1971); *B & B Asphalt Co.* v. *T. S. McShane Co.,* 242 NW2d 279, 286 (Iowa, 1976); Moore's Federal Practice, Vol. 1B, ¶0.405(1).

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[7] (Continued)
which, although it would have benefited intrastate commerce, was primarily intended to improve interstate rail service afforded to the area in question. *Chicago, M., St. P. & P. R. Co.* v. *Michigan Public Service Commission, supra,* at 50 NW2d 887.

Issues that are determinative of the present lawsuit have already been decided by a valid and final judgment of the I.C.C. in the Kalo Line Abandonment Proceedings, AB-1 (SUB-No. 24), in which both the Transportation Company and Kalo were parties. (ICC Order entered April 30, 1976, and affirmed by I.C.C. Order entered September 23, 1976, Def. Exhibit YYY, Appendix pages 33a-52a; Trial Court Opinion pages 19-22, Appendix pages 29a-30a). Quoting from the I.C.C. order entered April 30, 1976, the trial court held that the I.C.C. made a final determination of fact "that the cessation of service occurred because of conditions over which applicant (Defendant Railroad) had no control, not because of willful abandonment," and that "due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line." (Tr. Ct. Op. p. 21, Appendix pages 28a, 29a.) The trial court further held that, "It was upon a finding that Defendant Railroad had done nothing illegal or negligent that the final determination of the ICC was reached." (Tr. Ct. Op. p. 21, Appendix page 29a.) The I.C.C. order held that ". . . continued operation of the line would be an unnecessary burden on applicant and on interstate commerce. . . ." In other words, the Commission found that the cessation of service was beyond the control of the Transportation Company and that future public convenience and necessity did not require continued operation, and the Commission permitted abandonment because repair, future maintenance, and continued operation would have been an undue burden. The order of the Commission was not appealed.

In abandonment proceedings before the Interstate Commerce Commission the question of whether the present

condition of a line is due to a railroad's neglect or due to conditions beyond its control is always an issue of paramount importance. *General Foods Corp.* v. *Baker,* 451 F.Supp. 873, 876 (D. Md. 1978); *Missouri-Kansas-Texas Railroad Company Abandonment Between Altos and Forgan, Oklahoma,* 338 ICC 728, 743-748 (1971).

An unappealed determination of these factual issues by the Interstate Commerce Commission is as effective for the purposes of issue preclusion as determination by a court. Constitution of the United States, Article VI, Clause 2 ("Supremacy Clause"); *Baltimore & Ohio Railroad Company, et al.* v. *New York, New Haven & Hartford Railroad Company,* 196 F.Supp. 724, 744-745 (S.D.N.Y. 1961); *Seatrain Lines, Inc.* v. *Pennsylvania R. Co., et al.,* 207 F2d 255, 259 (3rd Cir. 1953).[8] A party that had an opportunity to litigate an issue before a federal agency may take advantage of statutory provisions for appeal of the agency's decision, but the party may not relitigate the issue by commencing an action in a court of original jurisdiction. *Siba Corp.* v. *Weinberger, Secretary of Health, Education & Welfare, et al.,* 412 U.S. 640, 644, 93 S.Ct. 2495, 37 LEd 2d 230 (1973); *United States* v. *Willard Tablet Co.,* 141 F2d 141, 143 (7th Cir. 1944).

The Federal Court of Appeals had jurisdiction to review the final order of the I.C.C. 28 USC §§2342(5) and 2321(a). No appeal was filed in the Court of Appeals.

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[8] Also, *see Board of Supervisors, Carroll County* v. *Chicago and Northwestern Transportation Company,* 260 NW2d 813, 815 (Ia. 1977); *United States* v. *State of South Dakota,* 212 F2d 14, 16 (8th Cir. 1954); *Landreth* v. *Wabash R. Co.,* 153 F2d 98, 100 (7th Cir. 1948), cert. denied, 328 U.S. 855, 55 S.Ct. 1345, 90 LEd 1627.

Instead, Kalo has in effect prosecuted an appeal in the Iowa District Court for Webster County.

Thus, the very issue upon which Kalo has proceeded in a state court action has been determined with finality by a federal agency with exclusive jurisdiction over the issues of service over the line, the continued existence of the line, and the events leading up to the presentation of these issues. Clearly a state court lacks jurisdiction over the subject matter of this case.

III.

The Iowa Supreme Court Decision Erred In That It Ignored The Fact That The Interstate Commerce Commission Has Primary Jurisdiction Over Issues Necessary To The Proof Of Kalo's Claims.

"National rather than local control of interstate railroad transportation has long been the policy of Congress." *Chicago* v. *Atchison, Topeka & Sante Fe R. Co.*, 357 U.S. 77, 87, 2 LEd 2d 1174, 1182, 78 S. Ct. 1063 (1958). The Interstate Commerce Commission has primary, if not exclusive, jurisdiction over "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by (the) Act." *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579, 16 LEd 2d 109, 114, 86 S. Ct. 1000 (1966). If an action for damages in Federal District Court involves issues that fall within the primary jurisdiction of the Interstate Commerce Commission, those issues must be referred to the Commission for determination. *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579, 16 LEd 2d 109, 114, 86 S.Ct. 1000 (1966). There is no mechanism allowing referral of issues from a state court to the ICC.

Assuming *arguendo* that this is a car service case and that a state court can in some instances have concurrent jurisdiction with the I.C.C. over car service where elements of intrastate commerce are present, this case wolud still have to be dismissed in state court because (a) there was no intrastate commerce and (b) the Commission had already decided that the cessation of service was not unlawful. The trial court held the issues for decision here involved questions of reasonableness of the Transportation Company's conduct and were for the Commission to decide. Even a federal court loses jurisdiction to the I.C.C. in a car service case when the issue is whether a rail carrier's rule or practice is reasonable. Federal courts have jurisdiction only when the rule or practice of the rail carrier is admittedly reasonable and the only issue to be decided is whether the carrier adhered to the rule or practice. *Midland Valley RR. Co.* v. *Barkley, et al.,* 276 U.S. 482, 484-487, 72 L.Ed. 664, 666-667, 48 S.Ct. 342, (1927); *U.S.* v. *New River Co.,* 265 U.S. 533, 541-542, 68 L.Ed. 1165, 1172, 44 S.Ct. 610 (1923).[9]

Even if this case was held to be one questioning the carrier's practices, issues as to reasonableness of practices have been held to be for the Commission. The I.C.C. has been held to have primary jurisdiction to decide whether a rail carrier may institute a new practice of providing service to a shipper on a less

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[9] Also, *see Morrisdale Coal Co.* v. *Pennsylvania R.R. Co.,* 230 U.S. 304, 313-314, 57 LEd 1494, 1497, 33 S.Ct. 938 (1912); *Loomis* v. *Lehigh Valley RR. Co.,* 240 U.S. 43, 50-51, 60 LEd 517, 519-520, 36 S.Ct. 228 (1916); *I.C.C.* v. *Baltimore & Annapolis RR. Co.,* 398 F.Supp. 454, 467-468 (D. Md. 1975), aff'd 537 F2d 77 (4th Cir.) cert. denied 429 U.S. 859, 97 S.Ct. 159, 50 LEd 2d 136 (1976).

frequent basis. *Elgin Coal Co.* v. *Louisville & Nashville R.R. Co.,* 411 F2d 1043, 1045-1046 (6th Cir. 1969). The Supreme Court of the United States held a state court could not entertain an action to require a rail carrier to construct inside doors on its produce hauling cars because the Interstate Commerce Commission had primary jurisdiction over the issue. *Loomis* v. *Lehigh Valley R.R. Co.,* 240 U.S. 43, 48-51, 60 L.Ed. 517, 519-520, 36 S.Ct. 228 (1916).[10]

Even if one assumes that the Iowa District Court for Webster County did at one time have concurrent jurisdiction with the I.C.C., it has no jurisdiction now because it cannot act in a manner inconsistent with an order of the I.C.C. *Far East Conference* v. *United States,* 342 U.S. 570, 574-575, 96 L.Ed. 574, 72 S.Ct. 492 (1952); 49 USC §1 (17) (a). The Iowa Supreme Court's disregard of an existing, unchallenged order of the I.C.C. amounts to an attempt to enlarge the jurisdiction of Iowa district courts in a manner not permitted by Title 49 of the United States Code.

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[10] Both *Pennsylvania RR. Co.* v. *Puritan Coal Mining Co.,* 237 U.S. 121, 130, 3 S.Ct. 484, 59 LEd 867, 872 (1915) and *Illinois Central RR. Co.* v. *Mulberry Hill Coal Co.,* 238 U.S. 275, 280-281, 59 LEd 1306, 1309, 35 S.Ct. 760 (1914), relied upon in the Iowa Court of Appeals opinion, were distinguished in the later case of *Midland Valley RR. Co.* v. *Barkley,* 276 U.S. 482, 486-487, 72 LEd 664, 667, 48 S.Ct. 342 (1927), by the Hon. Justice Brandeis on the grounds that in neither *Puritan* nor *Illinois Central* "was the reasonableness of the carriers' practice in controversy." Likewise, *Pennsylvania R. Co.* v. *Sonman Shaft Co.,* 242 U.S. 120, 125-126, 37 Sup. Ct. 46, 61 LEd 188 (1916), also relied upon by the Iowa Court of Appeals, did not involve the question of the reasonableness of the defendant's practice. *See, Spence* v. *Baltimore & Ohio Railroad Company,* 360 F2d 887, 890 (7th Cir. 1966).

CONCLUSION

The Interstate Commerce Act has preempted state law in the subject matter area of this case. Kalo's sole remedies under the Act lie in federal district court or before the I.C.C. Furthermore, the doctrine of primary jurisdiction gives the I.C.C. exclusive jurisdiction over issues that are determinative of Kalo's claims. Yet in this case the Iowa Supreme Court has not only refused to follow the federal doctrines of preemption and primary jurisdiction, but has also refused to give effect to the I.C.C. orders that collaterally estop Kalo from relitigating issues necessary to the proof of its claims. The position taken by the Iowa Supreme Court on the issues presented in this petition is an improper attempt to enlarge the jurisdiction of the state district courts of Iowa by refusing to follow the governing federal law.

For these reasons, and others set forth above in this pertition, petitioner respectfully prays that a Writ of Certiorari be granted to review the judgment of the Supreme Court of Iowa.

Respectfully submitted,

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